Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-91

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PADUNGSRI PHINPATHYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Heitland v. *INS*, 551 F.2d 495, cert. denied, 434 U.S. 819	5
INS v. *Wang*, 450 U.S. 139	2, 3
McColvin v. *INS*, 648 F.2d 935	5
Rosenberg v. *Fleuti*, 374 U.S. 449	5, 6
Villena v. *INS*, 622 F.2d 1352	2
Wang v. *INS*, 622 F.2d 1341	3
Statute and regulation:	
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
Section 101(a)(13), 8 U.S.C. 1101(a)(13)	5
Section 244(a)(1), 8 U.S.C. 1254(a)(1)	1, 3, 4, 5
8 C.F.R. 3.2	2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PADUNGSRI PHINPATHYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

---

1. Respondent contends (Br. in Opp. 1-2) that the case is moot. She asserts that since her return from Thailand in April 1974, she has been physically present in the United States for a continuous period of more than seven years. On the basis of this assertion, respondent claims that she could now move to reopen her deportation proceeding in order to file a new application for suspension of deportation. Accordingly, respondent argues, there is no reason for this Court to grant the petition because even if the Court were to reverse the judgment of the court of appeals, respondent would nonetheless be able to satisfy the "continuous physical presence" requirement of Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1).

Respondent's contention is manifestly without merit for a number of reasons. To begin with, the case is clearly not moot because respondent has not yet even filed a new application for suspension of deportation with the Board of Immigration Appeals, much less been found by the BIA to have satisfied the "continuous physical presence" requirement. In addition, while it is of course true that more than seven years have elapsed since respondent's April 1974 entry, we have no way of knowing whether respondent could sustain her statutory burden of demonstrating that she has been physically present in the United States for a continuous period of at least seven years. Certainly, nothing in the record of this case provides a basis for concluding that respondent could meet this burden, and counsel's unsupported assertions in the brief in opposition similarly do not establish that respondent could satisfy the "continuous physical presence" requirement.

Moreover, nothing in either the Immigration and Nationality Act or the regulations promulgated by the INS automatically entitles respondent to reopen her deportation proceeding for the purpose of filing yet another application for suspension of deportation. The Act itself does not expressly provide for a motion to reopen. The pertinent INS regulation, 8 C.F.R. 3.2, provides in relevant part that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material * * *." As the Court observed in *INS* v. *Wang*, 450 U.S. 139, 144 n.5 (1981), "the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened." The Court in *Wang* quoted approvingly from the dissenting opinion in *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc), in which Judge Wallace concluded that the INS had discretion beyond requiring proof of a prima facie case:

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

Under this approach, even if respondent were to file a motion to reopen, the INS clearly would be acting well within its discretion if it were to deny such a motion on the ground that the period after a finding of deportability should not be counted toward the statutory seven-year period. The INS is not required to permit deportable aliens, as a matter of course, to reopen deportation proceedings merely because they have demonstrated "'the ability to stay out of trouble with the police for seven years.'" *INS* v. *Wang*, *supra*, 450 U.S. at 145, quoting from *Wang* v. *INS*, 622 F.2d 1341, 1352 (9th Cir. 1980) (en banc) (Goodwin, J., dissenting). This is especially true when part of the seven-year period includes the time *following* a finding of deportability; otherwise, deportable aliens with access to legal services will have every incentive to attempt to prolong their illegal stays in this country through dilatory tactics and legal maneuvers in proceedings before the courts and the INS.

2. Respondent asserts (Br. in Opp. 2-5) that Congress intended the "continuous physical presence" requirement in Section 244(a)(1) to be "generously construed." But respondent points to nothing in the language, structure or history of the statute that supports her assertion. On the contrary, the legislative history to which respondent refers (Br. in Opp. 4) merely shows that Congress sought to make the discretionary

relief of suspension of deportation available to certain aliens who were not previously eligible for such relief. It does not show that Congress intended the courts to disregard the eligibility requirements set forth in the statute.

Respondent's argument illustrates the problem with the court of appeals' approach in this area: having started from the premise that the statute is to be "generously construed," the court proceeded to expand its interpretation of the statute in successive cases until the actual language of the statute has become largely irrelevant to the result reached in any given case. One does not have to subscribe to the view that the "continuous physical presence" language of Section 244(a)(1) was meant to be interpreted literally in order to conclude that the court of appeals has simply gone too far in holding that an alien such as respondent, who left the United States for *three months* and misrepresented her status in order to secure reentry into this country, has met the "continuous physical presence" requirement of the statute.

Respondent argues (Br. in Opp. 4-5) that a liberal interpretation of the "continuous physical presence" requirement would not detract from the exceptional nature of the suspension of deportation remedy because the alien must still satisfy the "good moral character" and "extreme hardship" requirements of the statute. Of course, the same argument could be made, in turn, with respect to each of the other statutory requirements.[1] Respondent also contends that a generous construction of the statute is appropriate because it will not require the granting of relief, which is within the Attorney

[1] In fact, as we noted in our petition (at 6 n.4), the erroneous approach of the court of appeals on the "continuous physical presence" issue is also reflected in its reversal of the determinations of the Board of Immigration Appeals on the "good moral character" and "extreme hardship" issues.

General's discretion. But Congress explicitly provided that the Attorney General need not exercise his discretion, and indeed does not even have authority to grant a suspension of deportation, unless the alien satisfies the statutory eligibility requirements. Unless Congress' dictates are to be ignored, the eligibility requirements must be given a more rigorous interpretation than that accorded by the court of appeals.

3. Respondent errs in asserting (Br. in Opp. 8-10) that the decision below is consistent with this Court's decision in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963).[2] The Court in *Fleuti* held that a resident alien's departure is not to be regarded as "intended" within the meaning of 8 U.S.C. 1101(a)(13) if it was innocent, casual and brief, and thus not "meaningfully interruptive" of the alien's permanent residence. This construction, the Court concluded, "protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action." 374 U.S. at 462.

In this case, the court of appeals considered whether respondent's trip abroad was "meaningfully interruptive" of her continuous physical presence in the United

[2] Although respondent claims (Br. in Opp. 5) that the decision below does not conflict with the Second Circuit's decision in *Heitland* v. *INS*, 551 F.2d 495, cert. denied, 434 U.S. 819 (1977), she concedes that the courts in the two cases reached "opposite results" on "substantially similar facts." Similarly, while respondent asserts that the court of appeals' decision here is not inconsistent with the Fourth Circuit's decision in *McColvin* v. *INS*, 648 F.2d 935 (1981), she acknowledges (Br. in Opp. 7) that the court in *McColvin* concluded that "Congress intended a restrictive interpretation of the seven year continuous physical presence requirement." Given the Fourth Circuit's view of congressional intent, which led it to conclude that a *one-day* departure rendered an alien ineligible for suspension of deportation, it is difficult, if not impossible, to believe that if this case had arisen in that circuit, respondent would have been found to have satisfied the "continuous physical presence" requirement of Section 244(a)(1).

States. Respondent's trip abroad was not "brief"; unlike Fleuti, whose visit to Mexico consumed "'about a couple of hours'" (374 U.S. at 461), respondent travelled to Thailand for three months. Nor was respondent's trip "casual"; unlike Fleuti, respondent obtained a passport before leaving the United States. Finally, respondent's actions were not "wholly innocent," because she misrepresented her status in order to secure reentry into this country. Under the standards enunciated in *Fleuti*, therefore, respondent's trip was meaningfully interruptive and thus she failed to meet the "continuous physical presence" requirement.

Respondent correctly notes (Br. in Opp. 7) that the Court in *Fleuti* indicated that factors other than the duration of the trip, the procurement of travel documents, and whether the alien sought to violate the immigration laws could be relevant in determining whether a trip was meaningfully interruptive. The court of appeals has essentially held, however, that the *Fleuti* factors are merely "evidentiary" and may be completely disregarded so long as the hardships associated with deportation "would be as severe if the absence had not occurred" (Pet. App. 8a). Because respondent's trip was meaningfully interruptive under *Fleuti*, the decision below is at odds with this Court's decision in that case.

The court of appeals' "hardship test" for determining whether an alien's absence is meaningfully interruptive is really no test at all. Under this "test," an alien with a sympathetic case on the merits of his suspension claim will easily be able to circumvent the statutory "continuous physical presence" requirement. This collapses the "continuous physical presence" requirement into the "extreme hardship" requirement and reads the former out of the Act. Because Congress clearly did not intend this result, which allows further wholesale evasions of

our Nation's immigration laws, the Court should grant review here in order to correct the manifest error of the court of appeals.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

OCTOBER 1982